Supreme Court, U.S.
FILED
MAR 11 1985
ALEXANDER L. STEVAS
CLERK

No. 84-480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

P.I.A. ASHEVILLE, INC.;
FIRST WASHINGTON GROUP, INC.;
CONSOLIDATED HEALTH SYSTEMS, INC.; and
PSYCHIATRIC INSTITUTES OF AMERICA, INC.,
Petitioners,

v.

STATE OF NORTH CAROLINA, *ex rel.*,
RUFUS L. EDMISTEN, Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONERS

JOEL I. KLEIN *
H. BARTOW FARR, III
PAUL M. SMITH
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

JOHN S. STEVENS
REDMOND, STEVENS, LOFTIN & CURRIER
Post Office Box 7146
Asheville, N.C. 28807
Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12 PP

TABLE OF AUTHORITIES

Cases Page

California Retail Liquor Dealers Association v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) 6, 7, 8
Huron Valley Hospital, Inc. v. *City of Pontiac*, 666 F.2d 1029 (6th Cir. 1981) 2
National Gerimedical Hospital and Gerontology Center v. *Blue Cross*, 452 U.S. 378 (1981) 1, 4
New Motor Vehicle Board v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978) 8
Pan American World Airways v. *United States*, 371 U.S. 296 (1963) 3, 4
Southern Motor Carriers Rate Conference v. *United States*, No. 82-1922 (cert. granted June 11, 1984) 6, 7
Town of Hallie v. *City of Eau Claire*, No. 82-1832 (cert. granted June 11, 1984) 2, 5, 8

Statutes

National Health Planning and Resources Development Act, 42 U.S.C. § 300k *et seq.* ..... *passim*
42 U.S.C. § 300k-2(b)(2) 4, 5
42 U.S.C. § 300n-1(c) 3
N.C. General Statutes § 131-179(d) 7

Other Authorities

H. Rep. No. 96-420, 96th Cong., 1st Sess. (1979) 5
S. Rep. No. 93-1285, 93d Cong., 1st Sess. (1974) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-480

P.I.A. ASHEVILLE, INC.;
FIRST WASHINGTON GROUP, INC.;
CONSOLIDATED HEALTH SYSTEMS, INC.; and
PSYCHIATRIC INSTITUTES OF AMERICA, INC.,
Petitioners,

v.

STATE OF NORTH CAROLINA, *ex rel.*,
RUFUS L. EDMISTEN, Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONERS

As we argued in our petition, this case raises important issues concerning federal and state regulation in the health-care field and the relationship of those regulatory efforts to the antitrust laws. The hospital acquisition at issue here was approved pursuant to a joint federal-state planning program that was enacted precisely because "the health care industry does not respond to classic marketplace forces." *National Gerimedical Hospital and Gerontology Center v. Blue Cross*, 452 U.S. 378, 392 (1981), *quoting* S. Rep. No. 93-1285, 93d Cong., 1st Sess. 39 (1974). This congressional recognition notwithstanding,

the Court of Appeals for the Fourth Circuit, sitting *en banc*, held that the approved acquisition was subject to being undone under the antitrust laws. In our view, that decision ignored established principles of implied repeal and state-action immunity from the antitrust laws, and thus paved the way for harmful judicial second-guessing of a whole array of federal and state planning decisions in the health-care field.

The United States, at the request of the Court, has now submitted a brief in opposition to the petition. Without disputing the importance of the decision below, the United States argues that the petition should nevertheless be denied because that decision was correct.[1] In attempting to fashion a rationale to support the Fourth Circuit's ruling, the Government simply disregards the essential purposes of the relevant federal and state health planning acts, statutes that it now apparently disfavors. It then proposes analyses of the implied repeal and state action issues that are incompatible with the Government's own arguments in No. 82-1832, *Town of Hallie v. City of Eau Claire* (cert. granted, June 11, 1984). We think that these arguments warrant a brief reply.

1. The United States begins by claiming that "[t]he record fails to suggest any congressional health planning objective that would be frustrated if the acquisition *in this case* were subjected to antitrust scrutiny." Br. at 6 (emphasis added). The suggestion seems to be that regulatory approval under the National Health Planning and Resources Development Act ("NHPRDA") can only create antitrust immunity where a court subsequently

---

[1] The Government also claims that there is no conflict between the decision below and the decisions of this Court or of other Circuits. As we showed in our petition, however, the Fourth Circuit's ruling is at odds with several decisions of this Court in the implied repeal and state-action areas. It is also incompatible with the Sixth Circuit's analysis in *Huron Valley Hospital, Inc. v. City of Pontiac*, 666 F.2d 1029 (6th Cir. 1981).

agrees that the regulatory decision furthers the goals of the Act. This argument is unavailing, for two reasons. First, there is no basis for applying any such test. Second, if there were, the regulatory decision in this case would satisfy such a test easily.

As an initial matter, it would make no sense for antitrust immunity to be contingent on a subsequent judicial analysis of the merits of a given regulatory decision. If, as we assert, Congress in the NHPRDA intended to exempt from antitrust scrutiny all hospital acquisitions subject to state regulatory approval, it clearly should not matter whether a federal court agrees that a particular acquisition furthered the general goals of the Act. By design, Congress has committed that determination to the state regulatory agency. It would plainly frustrate Congress's purpose if a federal court could review each regulatory decision to determine whether, in the court's view, the particular decision advanced the goals for which regulation was imposed in the first place. *See, e.g., Pan American World Airways v. United States*, 371 U.S. 296, 309-11 (1963).

In any event, despite the Government's protestations to the contrary, the state agency here specifically found—applying congressionally imposed criteria, *see* 42 U.S.C. § 300n-1(c)—that petitioners' acquisition of one hospital at a time when they also owned another hospital in the same city did further the goals of the NHPRDA. In particular, the agency found that the acquisition would further cost containment because the low purchase price would lead to lower long-run rates, that it would properly serve the needs of the local community including those who were "medically underserved," and that it would not have an adverse competitive effect on prices at petitioners' other facility in the area. J.A. 98-104.[2]

---

[2] "J.A." references are to the appendix filed in the court of appeals.

There is nothing about this determination that is inconsistent with the NHPRDA. On the contrary, Congress recognized in the Act that the competitive market for inpatient services does not appropriately "allocate supply" and called on health planning agencies to supplant competition with planning "where appropriate." 42 U.S.C. § 300k-2(b)(2). It is the essence of such planning for a regulatory body to weigh the various benefits of a particular acquisition against the costs (if any) in terms of lessened competition. That is precisely what occurred here. J.A. 102-03.

Indeed, as a paradigmatic example of planning under the NHPRDA, the regulatory decision in this case shows clearly why antitrust immunity is so important in this context. The "repugnancy" between such statutorily mandated planning and the antitrust laws results from the fact that those laws do not allow such a weighing of benefits. The two schemes—health planning and antitrust—will produce different results because they involve different criteria and assumptions. In its refusal to acknowledge this fundamental point, the United States simply reveals its unwillingness to accept the conclusions drawn by *Congress* in the NHPRDA concerning how best to regulate the health-care industry.[3]

---

[3] We can see no basis for the Government's further suggestion that planning decisions under the NHPRDA deserve less deference because they occur through regulatory approvals rather than "regulatory coercion." Brief at 7-8. Regardless of the form of the regulatory decision, the issue is whether Congress would have *intended* the decision to be overruled in an antitrust case governed by a quite different mix of principles and considerations. *National Gerimedical, supra*, 452 U.S. at 389. In view of the congressional finding that planning was needed to displace free competition, this seems implausible. *Cf. id.* ("The action challenged here was neither compelled *nor approved* by any governmental regulatory body.") (emphasis added); *id.* at 393 n.18 (voluntary "cooperation" among providers, undertaken at the urging of a local planning body, may be immune from antitrust attack); *Pan American World Airways*

2. The United States next argues that, because Congress did not mandate state regulatory approval of acquisitions, it did not intend to exempt acquisitions from antitrust scrutiny even when a state, in fact, engages in such regulatory approval. This argument is equally untenable.

While Congress did mandate certain features of every state health-planning statute, it is clear, as we demonstrated in our petition, that Congress also intended the states to tailor their health planning efforts to local needs. In this regard, states were given the specific option—reflected in the legislative history and in federal regulations—to require "that all acquisitions be reviewed under normal certificate of need procedures." H. Rep. No. 96-420, 96th Cong., 1st Sess. 86 (1979).

Despite this clear congressional authorization, the Government now suggests that antitrust immunity should extend only to acquisitions in which state approval is *mandatory*. Not only is this suggestion bereft of any support in the Act or legislative history, it is illogical. A basic premise of the NHPRDA was that "competition does not [and] will not appropriately allocate [inpatient services]," 42 U.S.C. § 300k-2(b)(2). Given that premise, Congress can hardly have wanted federal courts to undo state regulatory approvals undertaken in conformity with specific congressional standards in favor of review under a general competitive standard found not to work properly in the market for hospital services.

We should note in this regard that the Government's view of federal-state relations under the NHPRDA is fundamentally at odds with the view of state-local relations presented in its brief in No. 82-1832, *Town of Hallie*

---

v. United States, *supra* (CAB approval authority preempts antitrust laws). *See also* pp. 6-7 *infra* (discussing the problems with use of a concept of "compulsion" in the state-action context).

v. City of Eau Claire. In that case, the Government argued for local immunity from antitrust scrutiny on the basis of a state statute that "contemplated"—but did not mandate—local regulation. According to the Government, "effective implementation of state policy often requires the states to give subordinate governmental units discretion in implementing state policies that have been expressed in relatively general terms or that depend on the implementing body's expert analyses of particular circumstances." Br. at 17 (citations and footnote omitted). A similar need for flexibility obviously can arise where Congress seeks to carry out *its* policies through the instrument of state regulatory bodies. Here, for example, Congress adopted just such a discretionary approach with respect to state regulation of hospital acquisitions under the NHPRDA. There could be no justification for refusing to exempt such regulated acquisitions from antitrust review while, at the same time, *allowing* comparable antitrust immunity, as the Government urges, in the state-local context.

3. Turning to the state-action exemption issue, the United States first argues that the standards of *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), are inapplicable to private parties. As to them, the Government contends, there must be literal state compulsion for the exemption to apply. This issue is currently before the Court in No. 82-1922, *Southern Motor Carriers Rate Conference v. United States* (cert. granted June 11, 1984). We note here only that the instant case illustrates well why it is both impossible and unjustifiable to draw a clear line between those cases thought to involve compulsion and those thought to lack it.

Under the law of North Carolina, petitioners could not have acquired and operated any hospital in the state without explicit governmental approval. This requirement meant that, in effect, the state retained complete

control over who would own which hospital, and on what terms. The ultimate decisions made in this process were fully those of the *state* concerning how its health-care system should be designed. In this sense, they were certainly "compulsory."

What this case lacks, according to the United States, is a prior legislative or regulatory determination compelling this particular transaction. Put differently, the Government would require state *initiation* of the allegedly anticompetitive conduct. But whatever the merits of such a requirement in a case like *Southern Motor Carriers* involving joint rate-setting, it plainly makes no sense in a case involving acquisitions. It is totally unrealistic to expect states to plan in advance who should acquire particular hospitals, before any expression of interest by specific purchasers. In sum, the Government's test would foreclose the effectuation of state policy through the only approach that is practical in this context—case-by-case determinations.

4. The United States further contends that petitioners' acquisition is not exempt under the two-part test of *Midcal*. Its effort to show that North Carolina did not have a clear policy to "*displace competition* with regulation [with respect to hospital acquisitions]," Br. at 13 (citations omitted) (emphasis in original), is demonstrably unconvincing. The state statute in question begins by asserting "(t)hat, because of the manner in which health care is financed, *the forces of free market competition are largely absent and that government regulation is therefore necessary* to control the cost, utilization, and distribution of health services." Pet. App. 77a (emphasis added). To further this purpose, the statute then specifically requires regulatory approval for hospital acquisitions as well as for new construction. N.C. Gen. Stat. § 131-179(d). This plain indication of state policy satisfies the first part of the *Midcal* test.

The issue then boils down to the second part of the *Midcal* standard—the requirement of active supervision. As we explained in our petition, this standard should be reconsidered even as it applies to private parties subject to state regulation. For many of the same reasons advanced by the United States in *Town of Hallie v. City of Eau Claire*, *supra*, we believe that the active supervision requirement inevitably frustrates effective state regulation by imposing supervision requirements that the state itself thinks are unnecessary or counterproductive. Although the United States would attempt to distinguish state-local relations from state-private relations for exemption purposes, the distinction does not withstand scrutiny. A state obviously needs to be able to assure that private parties acting in accordance with its regulatory requirements are exempt from antitrust attack. Otherwise, appropriate state regulation designed to displace competition simply could not work.

We should also reiterate that the state here did, of course, carefully regulate the acquisition itself—which is the sole matter that we claim to be exempt from antitrust review. *Midcal* did not suggest that state supervision must extend beyond the transaction at issue and include *ongoing* regulation of the effects of a one-time decision. On the contrary, the Court has already ruled that the state action exemption applies so long as the state actively supervises the activity in question, irrespective of whether it also regulates the later effects of its initial regulatory decision. *See New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOEL I. KLEIN *
H. BARTOW FARR, III
PAUL M. SMITH
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037

JOHN S. STEVENS
REDMOND, STEVENS, LOFTIN
& CURRIER
Post Office Box 7146
Asheville, N.C. 28807

Counsel for Petitioners

* Counsel of Record

March 11, 1985